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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968 No. 575

STATE OF WISCONSIN,

Respondent,

v.

MICHAEL D. PRESTON,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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Attorney Kenneth J. Ehlenbach, on behalf of the petitioner, Michael D. Preston petitions for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin in the above entitled case.

OPINIONS BELOW

The judgment of the Supreme Court is officially reported in 38 Wis. (2d) 582 and unofficially in 157 N. W. (2d) 615.

JURISDICTION

The judgment of the Supreme Court of Wisconsin (App. 9) was entered on April 9, 1968, and the decision on the motion for rehearing was filed on June 28, 1968. The jurisdiction of this Court is involved under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the due process and equal protection, Article XIV, Sec. 1 of the United States Constitution:

Article XIV, Sec. 1, U.S. Const.,

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

The Supreme Court of Wisconsin adopted, as their own findings based upon the preponderance of the evidence and ordered the revocation of the Petitioner's license to practice in the State of Wisconsin and imposed costs. The motion for rehearing was denied on its merits, however, the Court subsequently modified its opinion. The question presented is:

1. Whether the petitioner's privilege to practice law in the State of Wisconsin was revoked in violation of his right to due process -- and equal protection of the laws.

STATEMENT

An original action was commenced in the Supreme Court of Wisconsin upon the complaint of the Board of State Bar Commissioners seeking the discipline of the petitioner, Michael D. Preston. The Court appointed Elton J. Morrison, retired County Judge, as Referee, to hear the matter and report his findings.

The Referee filed his findings of fact which were based upon the preponderance of the evidence, as follows:

> "With reference to Count 1 of the Complaint . . . I find from the preponderance of the evidence . . ." (Referee's Report, page 110) (App. 17)
>
> "I am convinced from the preponderance of the reputable testimony . . ." (Referee's Report, page 123) (App. 17)
>
> "The preponderance of the evidence shows that . . .." (Referee's Report, page 123) (App. 17)

The Supreme Court of Wisconsin adopted the findings of the referee based upon the preponderance of the evidence. (App. 17)

The petitioner moved the Court for a rehearing and raised the issue of the inadequacy of the

quantum of proof by alleging that to support disciplinary action against the petitioner the findings must be supported by clear, satisfactory and convincing evidence, thus raising the constitutional question of due process and equal protection of the laws.

The Supreme Court of Wisconsin by denying the petitioner a hearing on the issues raised, and subsequently modifying its opinion and imposing additional costs, deprived the petitioner of due process and equal protection of the laws.

REASONS FOR GRANTING THE WRIT

The referee's findings based upon the preponderance of the evidence were adopted by the Supreme Court of Wisconsin. Such action deprived the petitioner of due process and equal protection of the laws.

A State may not exclude a person from practice of law or any other occupation in a manner or for reasons that contravene due process clause of this amendment. Schware v. Board of Bar Examiners of State of N. M., N. M. 1957, 77 S. Ct. 752, 353 U. S. 232, 1 L. Ed. 2d 796, 64 A. L. R. 2d 288.

Supreme Court of United States will review state court order disbarring attorney where attorney makes substantial allegation that disbarment proceedings violated disbarment process or equal protection clause of this amendment. Lenske v. Sercombe, D. C. Or. 1967, 266 F. Supp. 609.

In the matter of John Ruffalo, Jr., petitioner, ___U. S. ___, 20 L. Ed. 2d 117, 88 S. Ct. ___, decided April 8, 1968, it was pronounced that

disciplinary proceedings are of a quasi criminal nature, In re Gault, 387 U.S. 1, 87 S. Ct. 1428.

The State of Wisconsin has adopted the rule that the quantum of proof in a quasi criminal case is a so-called "middle standard of proof which was applicable to civil actions involving criminal actions and fraud" as requiring "clear, satisfactory and convincing evidence," Madison v. Geier, 27 Wis. 2d 687.

In the later case of Neenah v. Alsteen, 30 Wis. 2d, 596, the Court confirmed the Geier case and stated:

> "The burden of proof must be sustained by evidence that is 'clear, satisfactory and convincing,' rather than a 'mere preponderance.'"

The rule generally prevailing in this country was enumerated in In Re Ratner, 399 P. 2d 865, 869 (Kan., 1965):

> "The burden of proof required in a proceeding of this character is greater than that required in ordinary civil proceedings, this view prevails generally in this country (7 Am. Jur. 2d, Attorney at Law, Sec. 67, p. 89, 90, 105, ALR Anno--Attorney's Misconduct--Degree of Proof, 984 et seq.)"

Quoting In Re Smith, 85 P. 2d 584:

> "Although the proceeding is not criminal it is of such a nature and the judgment is so severe and so direful in its results to an attorney, that something more than a mere preponderance of proof is necessary." (E.S.)

Further, in support of the general rule that proof required in these proceedings must be more than the preponderance of the evidence, are the following:

"It is true that a higher degree of proof should be, and we believe is, required in a proceeding such as this, involving the right and privilege to continue to engage in the practice of the law, than is required to determine questions of fact in the ordinary civil case, or proceedings, and we are mindful of that difference in the degree of proof." (E. S.) John V. Copren v. State Bar of Nevada, 173 ALR 284, 183 P. 2d 833, 840 (Nev. 1947)

"The rules of evidence in regard to unprofessional conduct by attorneys must be clear and convincing before disciplinary proceedings will be taken." (E. S.) In the Matter of a Member of the State Bar of Arizona, Francis J. Brown, 416 (P2d) 975, 977 (Ariz. 1966)

"The findings to sustain disbarment must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal case." (E. S.) State of Nebraska Ex Rel. Nebraska State Bar v. W. A. Nielsen, 136 NW 2d, 355, 360 (Neb. 1965)

"In making our determination we resolve all reasonable doubts in favor of the accused. If two or more equal inferences may be drawn from a proved fact the inference leading to a conclusion of innocence rather than one leading to a conclusion of guilt will be accepted." State Bar of California v. Zitny, 415, P. 2d 521, 523, (Cal. 1966)

"Charges of an attorney's unprofessional conduct should be sustained by convincing proof and to a reasonable certainty, and any reasonable doubt should be resolved in favor of the accused." (Brawner v. State Bar, 48 Cal. 2d 814 (1962).

In the initial judgment, the Supreme Court of Wisconsin assessed costs against the petitioner of a sum equal to one-half the costs not to exceed $5,000.00, in addition to the Order of revocation. In the petitioner's motion for reharing certain items of cost were challenged and although the Court denied the motion for rehearing, the challenged costs were eliminated, however, the fine was increased to $5,000.00.

The action of the Supreme Court of Wisconsin in revoking the petitioner's license based upon findings supported by the preponderance of the evidence and increasing the fine deprived the petitioner of due process and equal protection of the law, contrary to the United States Constitution.

The decision of the Supreme Court imposing such stringent restrictions on the defendant's right to gainful employment in the practice of the law is inconsistent with its own previous decisions and certainly inconsistent with the majority of decisions of other state courts and the United States Supreme Court.

CONCLUSION

This Court should grant certiorari to correct the manifest error of the Wisconsin Supreme Court in depriving the Petitioner of the right to practice in the State of Wisconsin, which decision was in violation of the Petitioner's constitutional rights.

Respectfully submitted,

KENNETH J. EHLENBACH

Attorney for the Petitioner